



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 4, 1992

Honorable Tom Craddick
Chairman
Committee on Public Health
House of Representatives
P. O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 92-80

Re: Whether V.T.C.S. article 6228a-5 provides employees with a right to designate an agent, broker, or insurance carrier for contributions an employer makes to a profit-sharing plan established pursuant to title 26 of the United States Code section 401 (ID# 16824)

Dear Representative Craddick:

You have asked us to interpret article 6228a-5 of the Texas Pension Code, V.T.C.S. title 109. Specifically, you ask whether article 6228a-5 authorizes employees of the Midland Independent School District (MISD) to designate an agent, broker, or insurance carrier for contributions MISD has made to a profit-sharing plan that MISD established pursuant to title 26 United States Code section 401. We are advised of the following facts:

During the 1984-85 school year, the Midland Independent School District adopted a defined contribution plan for employees of MISD. . . . The Plan is unique in that it combines an Internal Revenue Code (IRC) Section 403(b) salary reduction arrangement¹ with an IRC Section 401(a) profit

¹Section 403 of the Internal Revenue Code pertains to the taxation of employee annuities. Generally, under subsection (b)(1), amounts that an employer contributes for an annuity contract are excluded from the employee's taxable income if several prerequisites are met: (1) the employer is a political subdivision of a State, and the employee performs services at an educational organization (as 26 U.S.C. § 170(b)(1)(A)(ii) defines that term); (2) the plan does not fall within the ambit of 26 U.S.C. section 404(a)(2); (3) the employee's rights are generally nonforfeitable; (4) the plan is nondiscriminatory; and (5) in the case of a contract purchased under a plan which provides a salary

sharing type plan.² In operation, the Plan works as follows: The employee is allowed to contribute to the voluntary fund (the "V" fund) pursuant to a salary reduction agreement, an amount up to the maximum allowed by the Internal Revenue Code for tax deductible salary deferrals for an IRC Section 403(b) plan. MISD then contributes annually, on a matching basis, up to 3 percent of an employee's salary to the IRC 401(a) portion of the Plan (the matching or "M" fund). Under the Plan, the MISD matching contribution can not exceed 3 percent and is contributed from the general revenues received by the school district pursuant to its taxing authority. An employee must make a contribution to the "V" fund to participate in the Plan and the investment must be made in annuities which qualify under IRC 403(b). [Footnote omitted; footnotes added.]

We understand that the Internal Revenue Service has issued a determination letter to MISD stating that the "M" fund is qualified under title 26 of the United States Code section 401(a).³ Additionally, we are advised that MISD has chosen to invest the monies in the "M" fund in annuities.

Article 6228a-5 of the Pension Code states in pertinent part as follows:

(footnote continued)

reduction agreement, the plan satisfies the requirements of title 26 of the United States Code section 401(a)(30).

²Section 401 of the Internal Revenue Code pertains to qualified pension, profit-sharing, and stock bonus plans. In general, under subsection (a), a trust forming part of a pension, profit-sharing, or stock bonus plan that an employer established for the exclusive benefit of its employees or their beneficiaries qualifies under section 401 if the following conditions are met: (1) the employer, employees, or both contribute to the trust for the purpose of distributing to the employees or their beneficiaries the corpus and accumulated income of the trust in accordance with the plan; (2) the trust instrument forbids using any part of the corpus or income of the trust for any purpose other than the exclusive benefit of the employees or their beneficiaries, unless all liabilities with respect to the employees and their beneficiaries are satisfied; (3) the plan of which the trust is a part satisfies the requirements of title 26 of the United States Code section 410; and (4) the plan is nondiscriminatory.

³You do not ask, and we do not consider, whether state law authorizes MISD to adopt a profit-sharing plan that is qualified under title 26 of the United State Code section 401.

Section 1. Local Boards of Education of the Public Schools of this State . . . may enter into agreements with their employees for the purchase of annuities or for contributions to any type of investment for their employees as authorized in Section 403(b) of the Internal Revenue Code of 1954, as it existed in January 1, 1981.

Sec. 2. (a) If an employee of a governmental entity covered by Section 1 of this Act is paid by the Comptroller of Public Accounts, the comptroller may take the action, in regard to that employee, that is authorized by Subsection (b) of this section. If an employee of a governmental entity covered by Section 1 is not paid by the comptroller, the governing board of the governmental entity may take the action in regard to that employee.

(b) The comptroller or the governing board, as the case may be, may reduce the salary of participants when authorized in writing and shall apply the amount of the reduction to the purchase of annuity contracts or to contributions to any type of investment authorized in Section 403(b) of the Internal Revenue Code of 1954, as it existed on January 1, 1981, the exclusive control of which will vest in the participants.

(c) The employee is entitled to designate any agent, broker, or company through which the annuity or investment is to be purchased.

On its face, article 6228a-5 applies only to an employer's agreement, pursuant to section 403 of the Internal Revenue Code, to purchase annuities or to contribute to any type of investments for the benefit of the employees. See Attorney General Opinion MW-570 (1982) at 3. Article 6228a-5 does not affect a profit-sharing plan to which an employer contributes pursuant to title 26 of the United States Code section 401(a). Accordingly, participants in a profit-sharing plan that an employer (here, MISD) has instituted pursuant to title 26 of the United States Code section 401(a) have no right to designate an agent, broker, or company through which the employer must purchase annuities or other investments.

S U M M A R Y

Article 6228a-5 of the Texas Pension Code, V.T.C.S. title 109, does not entitle participants in a profit-sharing plan to which an employer contributes pursuant to title 26 of the United States Code section 401(a) to designate an agent, broker, or company through which the employer must purchase annuities or other investments.

Very truly yours,

A handwritten signature in cursive script, reading "Kimberly K. Oltrogge".

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee